Supreme Court, U.S.
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No. 03-246

IN THE
Supreme Court of the United States

WILLIAM A. BORDERS, JR.,

Petitioner,

v.

DISTRICT OF COLUMBIA OFFICE OF BAR COUNSEL,

Respondent.

On Petition For Writ Of Certiorari To The District Of Columbia Court Of Appeals

REPLY TO BRIEF IN OPPOSITION

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INTRODUCTION

Respondent's brief in opposition is remarkable as much for what it does *not* say as for what it does. As for what it does not say: respondent does not deny that this case squarely presents the constitutional question whether an attorney whose disbarment rests solely on the basis of a pardoned criminal conviction is entitled to reinstatement. Respondent, however, chooses entirely to ignore almost all of this Court's long line of cases addressing the scope of the President's pardon power. That is not surprising, for those cases unambiguously affirm that the President's pardon power extends to *any* disabilities that attach as a result of the pardoned conviction — including petitioner's disbarment here. Respondent's effort to distinguish this Court's seminal discussion of the pardon power in *Ex parte Garland*, 71 U.S. (4 Wall.) 333 (1866), as mere dictum is ultimately unavailing. Further, respondent downplays the opinion of the Office of Legal Counsel — the President's own attorneys — which expressly states that an individual in petitioner's circumstances should be entitled to reinstatement.

As for what the brief in opposition *does* say: respondent attempts to distract the Court by dwelling at length on (1) the nature of petitioner's underlying criminal conduct (for which petitioner has long since expressed remorse); (2) the broad power of States to protect the integrity of the legal profession (which petitioner does not question); (3) the existence of a statutory provision stating that reinstatement is discretionary, rather than mandatory (which merely begs the constitutional question); and (4) the supposed existence of a "finding" that petitioner's convictions necessarily involved moral turpitude (which is misleading at worst and irrelevant at best). When all the smoke is cleared away, however, respondent identifies no vehicle problems that preclude this Court's review. Because the decision below conflicts with decisions of this Court and a federal court of appeals on the scope of a fundamental enumerated power, *certiorari* should be granted.

REASON FOR GRANTING THE WRIT

THE D.C. COURT OF APPEALS ERRED BY HOLDING THAT A PRESIDENTIAL PARDON DOES NOT NULLIFY DISABILITIES IMPOSED SOLELY ON THE BASIS OF THE UNDERLYING CONVICTION.

A. Respondent contends that the decision below does not conflict with decisions of this Court and a federal court of appeals. *See* Opp. 13-22. That contention lacks merit.

1. As a preliminary matter, respondent does not challenge, or even refer to, many of this Court's cases on the scope of the President's pardon power, which make clear that the power reaches *any* disabilities that attach as a result of the pardoned conviction. *See, e.g.*, *United States v. Padelford*, 76 U.S. (9 Wall.) 531, 543 (1870) (stating that a pardoned individual is "relieved from any penalty which he might have incurred"); *Carlisle v. United States*, 83 U.S. (16 Wall.) 147, 151 (1873) (noting that "[a]ll have agreed that the pardon not merely releases the offender from the punishment prescribed for the offence, but that it obliterates in legal contemplation the offence itself"); *Osborn v. United States*, 91 U.S. 474, 477 (1876) (reasoning that "[i]t is of the very essence of a pardon that it releases the offender from the consequences of his offence").[1]

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[1] Although respondent does cite two other cases in passing, *see* Opp. 18, it mischaracterizes both of them. As to *Knote v. United States*, 95 U.S. 149 (1877), respondent ignores *Knote*'s description of a pardon as "an act of grace" that "releases the offender from all disabilities imposed by the offence, and restores to him all his civil rights." *Id.* at 153. Instead, respondent cites only that portion of *Knote* which states the unobjectionable proposition that a pardon "affords no relief for what *has been* suffered by the offender in his person by imprisonment, forced labor, or otherwise" *prior* to his pardon. *Id.* at 153-54 (emphasis added).

As to *Carlesi v. New York*, 233 U.S. 51 (1914), respondent correctly notes that the Court held that a State could treat a defendant as a repeat offender for sentencing purposes based on a pardoned conviction. *See id.* at 55-56. But respondent overlooks *Carlesi*'s admonition that, "if the act of the state in taking into consideration a [pardoned] conviction * * * was in any

2. Instead, respondent focuses almost entirely on this Court's decision in *Garland*, claiming that the Court's lengthy discussion of the pardon power was "dictum" because the Court indicated that the law at issue was also unconstitutional as a bill of attainder and *ex post facto* law. *See* Opp. 16-18. Although the latter is unquestionably true, *see Garland*, 71 U.S. at 377-78, that suggests at most that the Court's discussion of the Pardon Clause was in the nature of an alternative holding, rather than pure dictum.

Respondent nevertheless doggedly maintains that lower courts have "almost universally" interpreted *Garland*'s discussion of the pardon power as dictum. Opp. 17. That claim is utterly belied by the fact that the passage of *Garland* discussing the scope of the pardon power has been quoted at least 41 times by federal and state courts (including repeatedly by this Court) — and cited innumerable times more. Even the small sample of those cases which respondent cites do not characterize *Garland*'s *entire* discussion of the pardon power as "dictum," but instead assert that *Garland* stands only for the more modest proposition that a presidential pardon nullifies those disabilities that attach automatically as a result of the conviction itself — and not for the broader proposition, as some language in *Garland* suggests, that a pardon "blots out guilt" more generally by nullifying even disabilities that are based on the same *conduct* that underlies the conviction. *See, e.g.*, *In re North*, 62 F.3d 1434, 1437 (D.C. Cir. 1994) (referring to *Garland*'s "dictum about blotting out guilt"); *United States v. Noonan*, 906 F.2d 952, 958 (3d Cir. 1990) (rejecting view that a pardon "vitiate[s] guilt," but accepting Williston's view that a pardon "removes all legal punishment for the offense"); *Bjerkan v. United States*, 529 F.2d 125, 128 n.2 (7th Cir. 1975) (similarly rejecting *Garland*'s "suggest[ion]" that a pardon "blots out" guilt and accepting Williston's view). As discussed

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just sense a punishment for such prior crime," the act would be void. *Id.* at 57.

in our petition, the decision of the court below cannot be reconciled even with such a narrower interpretation of the pardon power. *See* Pet. 10-12.

3. Respondent seeks to distinguish other authorities on which petitioner has relied, including the Office of Legal Counsel's memorandum on the scope of the pardon power, on the ground that they involve the disbarment of an attorney based solely on the record of a conviction *after* the conviction has been pardoned. *See* Opp. 20 n.8. But this is a distinction without a difference — and respondent identifies no authority that draws it. It would be both nonsensical and inequitable to bar an individual from automatic reinstatement because he did not receive his pardon until after his disbarment, but to allow a similarly situated individual to obtain automatic reinstatement simply because he received his pardon more expeditiously. Indeed, far from drawing such a distinction, OLC's memo on the scope of the pardon power affirmatively takes the position that a pardon has the same effect regardless of when it occurs — even if it occurs *before* a conviction is actually entered. *See* Office of Legal Counsel, United States Department of Justice, Memorandum for the Pardon Attorney, June 19, 1995, *available at* http://www.usdoj.gov/olc/pardon3.19.htm.[2]

4. Respondent contends that there is no abiding conflict between the lower court and the Seventh Circuit, notwithstanding that court's decision in *Bjerkan*, in light of its subsequent decision in *Grossgold v. Supreme Court of Illinois*,

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[2] Similarly, respondent seeks to distinguish another case, *Ex parte Crisler*, 132 So. 103 (Miss. 1931), on the ground that the order of disbarment at issue there was entered at the same time as the criminal sentence, rather than in a separate disciplinary proceeding. *See* Opp. 15 n.6. Again, however, respondent fails to explain why this distinction is of constitutional import. There is no question in this case that, once petitioner was convicted, his disbarment was inevitable; the mere fact that the order of disbarment was separately entered is hardly surprising, since the conviction occurred in a different jurisdiction.

557 F.2d 122 (7th Cir. 1977). *See* Opp. 19-20, 22 n.12. As the Illinois Supreme Court's earlier decision in *Grossgold* indicates, however, that case did not involve a disbarment that attached *automatically* as a result of a pardoned conviction. *See In re Grossgold*, 317 N.E.2d 45, 47 (Ill. 1974). Unlike the D.C. Code provision at issue here, the relevant provision of Illinois law states that the existence of a conviction for a crime involving moral turpitude does *not* automatically lead to disbarment, but instead merely triggers the issuance of an order to show cause, in response to which an attorney may offer mitigating evidence on his behalf. *See* Ill. S. Ct. R. 761(b).[3] In fact, Illinois courts have expressly noted that an attorney's "actual conduct" may be taken into account in determining the appropriate sanction in cases involving crimes of moral turpitude. *See, e.g., In re Crane*, 178 N.E.2d 349, 400-01 (Ill. 1961). *Grossgold* thus stands only for the indisputable proposition that a presidential pardon does not relieve an attorney from discipline *altogether* — not for the more ambitious proposition that a presidential pardon does not relieve an attorney from *any type* of discipline. *See* 557 F.2d at 126. Nothing in *Grossgold* undermines *Bjerkan*'s broad holding that a presidential pardon nullifies *all* disabilities that attach *solely* by virtue of the underlying federal conviction. The D.C. Court of Appeals' decision cannot be reconciled with *Bjerkan*, and *certiorari* is warranted on that basis as well.

5. Respondent cites two state-court decisions for the proposition that the decisions of lower courts are "consistent" with that of the D.C. Court of Appeals. *See* Opp. 19-21. To the extent that respondent's characterization of those decisions is

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[3] Other States have widely varying practices, with some (like the District of Columbia) imposing automatic disbarment upon proof of a conviction for a crime involving moral turpitude, *see, e.g.*, Tex. Gov't Code § 81.078(c), and others (like Illinois) allowing an attorney to demonstrate that a suspension from practice would be inappropriate notwithstanding such a conviction, *see, e.g.*, Cal. Bus. & Prof. Code § 6102(a).

correct — and at least one of those decisions involves the scope of *gubernatorial*, not *presidential*, pardon power, *see In re Lavine*, 41 P.2d 161, *modified*, 42 P.2d 311 (Cal. 1935) — the mere fact that other decisions have come out the *same* way as the decision below does not contravene the fact that decisions of this Court, and at least one federal court of appeals, have come out the *other* way. The existence of those other decisions merely illustrates, if further illustration were necessary, that the issue raised by this petition is a recurrent one meriting this Court's review.

B. Respondent advances a number of other arguments in an attempt to convince this Court that *certiorari* is not warranted. Those arguments lack merit.

1. Respondent devotes a substantial portion of its brief in opposition to a discussion of the conduct underlying petitioner's 21-year-old criminal convictions for conspiracy to commit bribery and related offenses, and of the subsequent procedural history. *See* Opp. 3-9. Specifically, respondent emphasizes petitioner's unwillingness to testify against Alcee Hastings, the alleged recipient of the bribes. *See id.* at 5-6, 7, 8. As a preliminary matter, the nature of petitioner's conduct is simply irrelevant to the constitutional question presented here: however egregious that conduct, if petitioner's disbarment rested *solely* on his conviction for that conduct, it must fall along with the conviction upon receipt of a pardon. Respondent all but ignores the fact that the court below has recognized that petitioner has expressed remorse for his conduct, *see In re Borders*, 665 A.2d 1381, 1383 (D.C. 1995); has acknowledged that petitioner is competent to practice law, *see id.*; and has conceded that petitioner's character witnesses are "admittedly impressive," *id.* at 1385. To the extent the equities are relevant here, they weigh in favor of, not against, petitioner, and in favor of granting *certiorari*.

2. At various points, respondent rests on the broad power of States (and Congress, in the case of the District of Columbia)

to protect the integrity of the legal profession. *See, e.g.*, Opp. 10. That power is undoubted — as is the power of States more specifically to establish standards for the ethical conduct of attorneys. And it is precisely on that basis that courts have established rules disciplining attorneys for engaging in conduct that may *also* be the subject of a criminal conviction — such as "conduct involving dishonesty, fraud, deceit or misrepresentation," or "conduct that seriously interferes with the administration of justice." D.C. Rule of Professional Conduct 8.4. Again, however, where States choose to make disciplinary sanctions turn entirely on the existence of a criminal *conviction*, rather than any independent determination regarding the underlying *conduct*, those sanctions constitute disabilities attendant to the conviction, and therefore must fall when the conviction is pardoned. Because respondent could pursue sanctions against petitioner under other disciplinary provisions, *see* Pet. 16 n.11, a ruling in petitioner's favor would not somehow endanger the ability of District of Columbia courts to "ensure the competency and moral fitness of its members," Opp. 1. This policy interest thus does not weigh against the granting of *certiorari*.

3. Respondent next notes that D.C. Code § 11-2503(a) suggests that reinstatement to the Bar in these circumstances is permissive, rather than mandatory, and adds that the legislative history supports that construction. *See* Opp. 12-13. It is plain, however, that Congress may not circumscribe the scope of the President's pardon power. *See, e.g., Schick v. Reed*, 419 U.S. 256, 266 (1974); *United States v. Klein*, 80 U.S. (13 Wall.) 128, 147-48 (1871). To the extent that D.C. Code § 11-2503(a) does suggest that reinstatement is anything other than mandatory upon receipt of a pardon for the conviction on which the disbarment rested, it is quite simply unconstitutional. The mere fact that Congress may have *intended* that reading of the statute — as is presumably the case whenever a statute is enacted whose constitutionality is subsequently called into question —

provides no reason to deny *certiorari*.

4. Respondent attempts to insinuate that petitioner's disbarment did not attach automatically upon receipt of his conviction because it required a "disciplinary proceeding" to make a "finding" that the convictions were for crimes involving moral turpitude. *See* Opp. 14-15. It is beyond question, however, that the "disciplinary proceeding" in this case was a mere formality, involving only a mechanical determination (made without even a hearing) that petitioner's criminal convictions were for offenses in the class covered by the statute. As respondent concedes, *see id.* at 5, 14-15, that determination was controlled by an earlier decision of the D.C. Court of Appeals, *see In re Colson*, 412 A.2d 1160, 1168 (D.C. 1979) (*en banc*). And that determination did not turn on specific findings regarding the facts of petitioner's actual conduct, but instead turned only on the *category* of crime for which petitioner had been convicted. *See id.* at 1164. As we have already noted, *see supra* p. 4 n.2, it would elevate form over substance to suggest that petitioner should not be entitled to reinstatement simply because his disbarment occurred in a "disciplinary proceeding," rather than a "criminal sentencing," Opp. 15. Because petitioner's disbarment inevitably flowed from his subsequently pardoned conviction, the constitutional question is squarely presented here, and *certiorari* is warranted.

C. Finally, respondent contends that the decision below, if allowed to stand, will not have far-reaching implications. *See id.* at 22-23. In this respect, too, respondent errs.

1. In our petition, we contended that the decision below will allow a wide range of disabilities that depend solely on a federal conviction — such as restrictions on the rights to vote and carry firearms — to remain in effect even when the underlying conviction has been nullified by a presidential pardon. *See* Pet. 15-16.[4] Respondent's sole answer is that this

[4] A study released in the last few days estimates that more than four million

case "does not concern a disability or punishment imposed for a pardon." Opp. 22. But respondent cannot seriously argue that deprivation of the right to practice one's chosen profession does not, at a minimum, constitute a "disability" at least as severe as the deprivation of other rights. Indeed, respondent entirely ignores that portion of this Court's decision in *Garland* which states that deprivation of the right to practice law does not merely constitute a disability, but rises to the level of *punishment* for the underlying offense. *See* 71 U.S. at 377 (noting that "exclusion from any of the professions or any of the ordinary avocations of life for past conduct can be regarded in no other light than as punishment for such conduct"). Because this case concerns at least a "disability" imposed for a conviction, if not a "punishment," respondent's claim that the decision below is limited to the specific context of disbarment reflects little more than wishful thinking.

2. Respondent suggests that this case is of limited significance because petitioner could receive the same sanction in subsequent proceedings under other disciplinary provisions. *See* Opp. 23 n.13. Even if it were certain (and it manifestly is not) that disbarment would result from subsequent proceedings, that is no excuse for failing to turn square constitutional corners. In any event, as the aggressive manner in which respondent has litigated this case amply demonstrates, it is far from clear that disbarment would still result: whereas *petitioner* would bear the burden of proof, by clear and convincing evidence, as to his rehabilitation in any subsequent *reinstatement* proceedings if the decision below were allowed to stand, *see* D.C. Bar R. 11, § 16(d), *respondent* would bear the burden of proof, again by clear and convincing evidence, as to petitioner's guilt in any subsequent *disciplinary* proceedings if

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Americans are barred from voting under state law because they have been convicted of felonies. *See* Sentencing Project, *Legislative Changes on Felony Disenfranchisement, 1996-2003*, Sept. 2003, at 1, *available at* http://www.sentencingproject.org/pdfs/legchanges-report.pdf.

the decision below were invalidated, *see, e.g., In re Slattery*, 767 A.2d 203, 208 (D.C. 2001), and would further have to demonstrate that an additional period of disbarment would be the appropriate sanction. Indeed, it is far from clear that respondent would even decide to pursue further charges against petitioner, in light of the fact that petitioner has already been suspended from the practice of law for more than twenty years — not to mention the fact that petitioner's reinstatement to the Bar has become something of a *cause célèbre*. *See, e.g.*, William Raspberry, *Pardoned But Still Disbarred*, Wash. Post, June 23, 2003, at A21.

This case is of significance not just to petitioner, but to the many other recipients of presidential pardons. The decision below has broad implications and is inconsistent with fundamental constitutional principles. *Certiorari* should be granted.

CONCLUSION

The Court should grant the petition for *certiorari*. Alternatively, in light of the fact that this case implicates a core executive power, the Court should call for the views of the Solicitor General.

Respectfully submitted,

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